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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE C.. WALLACE, Governor of the State of Alabama, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

DOUGLAS T. SMITH, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

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ARGUMENT

A. The Establishment Clause Does Not Prohibit Individual Silent Prayer or Meditation in Public Schools, as Demonstrated by Its Judicial Construction, Intended Meaning, and Contemporaneous History.

The briefs of the appellees and supporting amici are remarkable for their turning of a blind eye to the findings of the trial court below. They assume, as did the Eleventh Circuit Court of Appeals,[1] that this "Court has repeatedly considered and rejected" the historical evidence.[2]

The trial court below premised its preliminary injunction on that same assumption.[3] However, after four days of trial involving the testimony of expert witnesses on the original intention of the First Congress and its contemporaneous history,[4] the trial court dissolved its preliminary injunction[5] and dismissed the actions,[6] holding:

> This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the

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[1] *Jaffree v. Wallace*, 705 F.2d 1526, 1530 (11th Cir. 1983).

[2] Brief for American Jewish Congress at 3.

[3] *Jaffree v. James*, 544 F. Supp. 727, 731 (S.D. Ala. 1982).

[4] Testimony and findings also covered subsequent events such as the effect of the fourteenth amendment upon the first amendment and the defeat of the Blaine Amendment. *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. 1104, 1118-26 (S.D. Ala. 1983).

[5] *Jaffree v. James*, 554 F. Supp. 1130, 1132 (S.D. Ala. 1983).

[6] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1130 and *Jaffree v. James*, 554 F. Supp. at 1132.

> school which the states and their political subdivisions mandate. . . .[7]

While the Court has addressed some historical materials as the basis for its prior decisions,[8] never before has it been confronted with the historical materials presented as evidence and ruled upon as findings of fact by a trial court. Nor has this Court ever focused on the historical evidence on federal support of religion in public education contemporaneous with the first amendment's passage.[9] Nor has this Court been presented with so exhaustive an analysis of the Congressional debates on the first and fourteenth amendments in briefs or oral arguments as it is in these cases.[10] These cases, furthermore, involve historical evidence that was not available to the Court in *Everson*, *Engel*, or *Schempp*.[11]

Not surprisingly, neither the appellees nor their supporting amici address the Northwest Ordinance which provides:

> *Religion*, *morality* and knowledge, being necessary to good government and the happiness of mankind,

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[7] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128.

[8] *See, e.g., Everson v. Bd. of Education*, 330 U.S. 1 (1947).

[9] *See* Brief for Appellants Smith at 15-28 and Brief for Appellants Wallace at 16-30 with separate appendix.

[10] *See* Brief for Appellants Smith at 31-39, 1a-27a and Jurisdictional Statement for Appellants Smith at 11-21.

[11] *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). The Brief for American Jewish Congress at 4 falsely gives the impression that this Court considered Jefferson's 1803 treaty with the Kaskaskia Indians, which provided money to build a church and pay a Catholic priest, in *Quick Bear v. Leupp*, 210 U.S. 50 (1908). *Quick Bear* was not an establishment clause decision (210 U.S. at 81), but, rather, involved the Sioux treaty of April 29, 1868 (15 Stat. 635) and an Act of Congress of June 7, 1897 (30 Stat. 62). The Court in *Quick Bear* certainly did not consider Jefferson's 1803 treaty as evidence that he did not believe in an absolute "wall of separation." *See Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1117.

> schools and the means of education shall forever be encouraged.[12]

Clearly the contemporaneous acts of the First Congress which proposed the first amendment are of preeminent importance in understanding the intended meaning of the establishment clause.[13] Instead, the appellees' amici would once again draw attention away from the acts of Congress as a whole to focus on the views of one legislator alone, Madison, and to the subsequent statements of a non-participant, Jefferson.[14]

The Supreme Court of 1878 engaged in the same erroneous method of constitutional interpretation when it first adopted the phrase "wall of separation." When faced with a claim that polygamy was protected under the free exercise clause, the Court in *Reynolds v. United States*, 98 U.S. 145 (1878), demonstrated an application of the contemporaneous act method of interpretation in its review of the actions of the Virginia legislature. The

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[12] Northwest Ordinance, Art. III, 1 Stat. 52 (Aug. 7, 1789) (emphasis added). *See* R. CORD, SEPARATION OF CHURCH AND STATE, HISTORICAL FACT AND CURRENT FICTION 61-63 (1982), copies of which have been lodged with the Clerk of this Court.

[13] "The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress 'was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the *greatest weight in the interpretation* of that fundamental instrument,' *Myers v. United States*, 272 U.S. 52, 174-75, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926)." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984) (emphasis in original). *See also Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1115. The Congressional debates on the first amendment have been addressed in Brief for Appellants Smith at 31-37, 1a-27a.

[14] Brief for Senator Weicker at 10-11. *See Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1115-18 for the trial court's findings on the positions of Jefferson and Madison. *See* J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 66-107 (Leonard W. Levy ed. 1972) and R. CORD, *supra* note 12, at 16-82 for studies of the private statements versus public actions of Jefferson and Madison (excerpts of which are quoted at pages 30a-43a of Appendix to Brief for Appellants Smith).

Court noted that since Virginia passed an act establishing religious freedom, recommended an amendment to the Constitution of the United States ensuring free exercise of religion, and passed an act making polygamy a punishable offense, then polygamy was not intended to be a protected religious freedom.[15]

The *Reynolds* Court, however, completely abandoned the contemporaneous act method of interpretation on the federal side of the equation. In trying to ascertain the meaning of the first amendment of the United States Constitution, the Court did not review the debates to find the intent of Congress and the ratifying state legislatures and did not look to the contemporaneous acts of Congress to find its intent. Instead, it looked to Madison's writing about and for another event, his *Memorial and Remonstrance*, and relied on Jefferson's 1802 "wall of separation" letter, while noting that he was absent as Minister to France during the drafting, debate and adoption of the first amendment.[16]

Recently, in *Marsh v. Chambers*, 103 S.Ct. 3330 (1983), this Court spoke of the importance of the contemporary act method of analysis:

> [H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they though that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. An act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning". *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).[17]

[15] *Reynolds v. United States*, 98 U.S. at 165. Note, though, that these two acts and the amendment recommendation were passed by different bodies at different times. The passage of the Northwest Ordinance at the same time and by the same group of men that passed the first amendment is much stronger evidence of intended meaning. Note also that *Reynolds* was a free exercise clause case and that the "wall of separation" was interpreted within that context. 98 U.S. at 164.

[16] *Reynolds*, 98 U.S. at 163-64.

The failure to use this method of recognized constitutional interpretation by the 1878 Court (and of subsequent Courts to correct it) has led to a burdensome load of establishment clause cases for the federal judiciary and contributed to a public lack of confidence in the Supreme Court as an institution.

To properly understand Jefferson's "wall of separation" phrase as it applied to free exercise, it too must be understood within the historical context. Jefferson apparently borrowed phraseology from the Baptist leader and advocate of religious liberty of the previous century, Roger Williams of Rhode Island. Williams had written,

> [W]hen they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will eer please to restore His garden and paradise again, it must be of necessity be walled in peculiarily unto Himself from the world.[18]

Like Jefferson, Williams spoke of a "wall of separation" between church and state. But to Williams, the "wall" existed to protect the church from the state, not to protect the state from the church. Speaking to a Baptist audience, it seems likely that Jefferson intended the same meaning.

But where was the wall to be placed? What did Jefferson really mean by "state"? It seems likely that he used the term in its generic sense to refer to government in general and the federal government in particu-

[17] *Marsh*, 103 S.Ct. at 3344.

[18] Roger Williams, *quoted in* M. Howe, The Garden and the Wilderness vi (1965).

lar, not to the state governments. For Jefferson recognized that the state governments could regulate religion.[19] In his second inaugural address he said,

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[20]

Jefferson's view of the first amendment as expressed in 1805 in his second inaugural address is identical with his view expressed in 1798 when he drafted the Kentucky Resolutions.[21]

The examination of historical materials by previous Courts has indeed been too myoptic.[22] The concurrent, interwoven legislative histories of the Northwest Ordinance and the first amendment[23] clearly demonstrate

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[19] Appellants Smith are indebted to John Eidsmoe, Visiting Professor of Law at Oral Roberts University, for these thoughts. *Accord* R. CORD, *supra* note 12, at 115 and *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1118. *See also* W. MARNELL, THE FIRST AMENDMENT 115-16 (1964) (cited in Brief for Amicus Weicker at 6).

[20] 3 A. BERGH, WRITINGS OF THOMAS JEFFERSON 378 (1903).

[21] 4 THE ANNALS OF AMERICA 63 (1968). In these resolutions, Jefferson also stated that the *federal courts* were excluded from jurisdiction over religious matters.

Justice Story (1770 to 1845), a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as Professor of Law at Harvard Law School, agreed with Jefferson. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 at 634 (1891). *See also* Brief for Senator John P. East, *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

[22] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1129.

[23] *See* Brief for Appellants Smith at 15-28.

that the First Congress saw no conflict between the establishment clause and encouraging that religion be taught and prayers be given in the public schools in the Northwest Territory created and supported by grants of federal land.[24] A moment of silence for "mediation of silent prayer" should certainly, then, be constitutional.

B. The Appellees and Amici Argue for an Absolutist Approach to "Complete Separation" of Church and State, an Approach Which this Court Has Consistently Rejected.

The appellees and amici argue for an "impregnable 'wall'" between church and state[25] and "a complete and permanent separation."[26] Just this year, however, this Court in *Lynch* stated expressly that "the Constitution [does not] require complete separation of church and state"[27] and that the Court has "uniformly rejected" an "absolutist approach in applying the Establishment Clause."[28]

Jaffree, moreover, describes the concept of accommodation as "loose language" in Supreme Court opinions[29] and ignores the *Lynch* decision except for two out-of-context references. The concept of accommodation, however, is viewed by this Court as a necessary part of the free exercise clause and the establishment clause, which prohibits hostility or callous indifference to religion.[30] Government may "accommodate religious needs of the people."[31] The "limits of permissible state accommoda-

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[24] *See Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1983).

[25] Brief for Appellees Jaffree at 8, 10.

[26] Brief for Amicus Weicker at 5.

[27] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[28] *Id.* at 1361.

[29] Brief for Appellees Jaffree at 8.

[30] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[31] *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

tion to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself,"[32] and "bring us into war with our national tradition."[33] "[A]ccommodation . . . respects the religious nature of our people."[34]

C. Silent "Meditation or Voluntary Prayer" Is Not Controlled by *Engel* or *Schempp*.

Both *Engel v. Vitale*, 370 U.S. 421 (1962)[35], and *Abington School District v. Schempp*, 374 U.S. 203 (1963)[36] involved state mandated religious exercises in public schools. *Engel* also involved a prayer "prescribe[d] by law" which the Court held "officially establishes the religious beliefs embodied in the Regent's prayer"[37] and, although voluntary, involved "indirect

[32] *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). Appellees argue against this definition of accommodation when they say that accommodation only applies where there has been a free exercise violation. Brief for Appellees Jaffree at 9, 21-22. Brief for Amici ACLU at 23-26. The fact that the bill's sponsor, Senator Holmes, was asked to introduce such a piece of legislation because his constituency believed that they were prohibited from praying in school (J.A. at 48, 53) appears to be unpersuasive to the appellees.

[33] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[34] *Id.* at 1361.

[35] "The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, *directed* the School District's principal *to cause* the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. . . ." 370 U.S. at 422 (emphasis added). The New York Court of Appeals upheld the use of the prayer if students were not compelled to participate in saying the prayer. 370 U.S. at 423-24.

[36] "[W]e find that the States are *requiring* the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison." 374 U.S. at 223 (emphasis added).

[37] *Engel v. Vitale*, 370 U.S. at 430.

coercive pressure upon religious minorities to conform to the prevailing officially approved religion."[38]

In *Schempp*, the required daily readings from the Holy Bible and recitation of the Lord's Prayer by the students were "religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict *neutrality*, neither aiding nor opposing religion."[39]

The silent "meditation or voluntary prayer" statute here does not violate the holdings in *Engel* and *Schempp*. It neither prescribes a prayer, establishes an officially approved religion, coerces conformity, nor violates neutrality. It affords accommodation within strict but "wholesome 'neutrality.'"[40]

This was the apparent consensus of the academic community as evidenced by Professor Tribe's constitutional treatise[41] and Justice Brennan's favorable remarks in *Schempp*.[42] The federal district court in *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976),[43] came to the same conclusion seven years ago in a case involving a statute similar to the Alabama statute under attack in these cases. In agreement are Circuit Judges Roney, Tjoflat, Hill, and Fay, who joined in a dissenting opinion in a motion for rehearing by the Eleventh Circuit for the case at hand stating: "The testimony of the sponsor of the Alabama law, *Jaffree v. James*, 544 F. Supp. 727, 731 (S.D. Ala. 1982) should not be used to invalidate a

[38] *Id.* at 431.

[39] *Abington School Dist. v. Schempp*, 374 U.S. at 225 (emphasis added).

[40] *Id.* at 222. *See* Brief for Amicus State of Connecticut at 7-8 and Brief for Amici States' Attorneys General at 9-14.

[41] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 829 (1978).

[42] *Abington School Dist. v. Schempp*, 374 U.S. at 281 and n.57 (Brennan, J., concurring).

[43] *See also Opinion of the Justices*, 228 A.2d 161 (N.H. 1967).

neutral statute which is both facially and operationally constitutional." [44]

If chaplains' prayers,[45] holidays for giving thanks to God,[46] and national days of prayer[47] are constitutional then silent "meditation or voluntary prayer" is a fortiori constitutional.

D. An Alternative to the Tripart Test Should Be Employed, as the Court Did in *Marsh* and *Lynch*.

Appellees Jaffree tell this Court that it "must" use the three part standard fashioned in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[48] However, this Court has explicitly recognized alternative approaches to the establishment clause besides the tripart test, and has explicitly said that the tripart test is not an exclusive approach to the establishment clause: "[W]e have repeatedly emphasized our *unwillingness to be confined to any single test or criterion in this sensitive area. In two cases, the Court did not even apply the 'Lemon test.'* We did not, for example, consider that analysis relevant in *Marsh, supra.* Nor did we find *Lemon* useful in *Larson v. Valente. . . .*" [49] This decision makes it clear that the tripart test is not exclusive and that alternative tests may and sometimes should be used.

The one alternative test that the Supreme Court has used thus far is a historical test, as employed in *Lynch.*[50]

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[44] *Jaffree v. Wallace*, 713 F.2d 614, 615-16 (11th Cir. 1983) (emphasis added).

[45] *Marsh v. Chambers*, 103 S.Ct. at 3335.

[46] *See Lynch v. Donnelly*, 104 S.Ct. at 1360.

[47] *See Id.* at 1361.

[48] Brief for Appellees Jaffree at 17.

[49] *Lynch v. Donnelly*, 104 S.Ct. at 1362 (citations omitted) (emphasis added). *Accord, Marsh v. Chambers*, 103 S.Ct. at 3335; *Larson v. Valente*, 456 U.S. 228 (1982); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971); *see Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

[50] *Lynch v. Donnelly*, 104 S.Ct. at 1359 and 1361.

The Court, in applying the alternative historical test in *Marsh*, upheld legislative chaplains on the basis of an extensive discussion of contemporaneous history.[51] The appellants suggest to the Court that the historical test should be applied in this case to the moment of silence for permissive prayer or mediation in public schools, just as it was applied in *Marsh* to uphold the prayers offered by a state-paid chaplain to a state legislature. However, if the tripart test is applied, the primary effect and purpose of a moment of silence are constitutional under *Lynch* and *Marsh*, with no excessive entanglement.

E. The Alabama Statute Permitting Silent "Meditation or Voluntary Prayer" Is a Constitutional Accommodation.

Justice Douglas, writing for the Court in *Zorach v. Clauson*, said the following on accommodation: "When the state *encourages . . . or cooperates with . . .* sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." [52]

This Court has distinguished between toleration and accommodation. In *Lynch* this Court stated unequivocally that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." [53]

The essence of the difference between toleration and accommodation is the perceived origin of the rights in

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[51] *Marsh v. Chambers*, 103 S.Ct. at 3335. *Accord, id.* at 3338 (Brennan, J., dissenting): "The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."

[52] *Zorach v. Clauson*, 343 U.S. at 313-14 (emphasis added).

[53] *Lynch v. Donnelly*, 104 S.Ct. at 1359 (citations omitted).

question. When a state tolerates a religion, civil liberties are creatures of the sovereign state's good pleasure. Religious rights are given only if, when, and for as long as expedient. Tolerance becomes intolerance when the good graces of the States or its agents change.

Accommodation, on the other hand, recognizes that liberties exist independent of government, which has not created them. Liberties are, according to the Declaration of Independence, "unalienable Rights" with which men have been "endowed by their Creator," "the Supreme Judge of the World." Jefferson acknowledged the origin of these rights and their dependency on that Source when he said "God Who gave us life gave us liberty. Can the liberties of a nation be secure when we remove a conviction that these liberties are the gift of God?" [54] For, according to Justice Story, quoted in *Lynch*, 104 U.S. at 1361, "[t]he real object of the amendment was *not to . . . prostrat*[*e*] *Christianity; but* . . . to prevent any national ecclesiastical establishment . . ."[55]

Where our courts require that all religions be equated in the public square, toleration rules and free exercise is restricted. A position that prohibits one religion from advancing more than another was abhorrent to the men who wrote the religion clauses according to Justice Story:

> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to *receive encouragement from the state* so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to *level all religions*, and to make it a matter of state policy to hold all in *utter indifference*, would have

[54] Inscribed on the Thomas Jefferson Memorial, Washington, D.C.

[55] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833) (portions omitted from *Lynch* are set out in italics).

> created *universal disapprobation*, if not *universal indignation*. . . .[56]

The drift from accommodation in early America towards current toleration has been slow yet steady, moving from "this is a Christian nation" [57] to "[W]e are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God" [58] to "[w]e are a religious people whose institutions presuppose a Supreme Being" [59] to "neither a State nor the Federal Government . . . can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" [60] to "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God." [61] When the whole spectrum is thus viewed, there is a perceptible drift from accommodation to toleration. The constitutional prohibition against "*an* establishment of religion" has been rewritten to prohibit any encouragement of religion in public, choking free exercise and limiting religious practice to private property.[62]

Appellees Jaffree would have this Court officially redefine accommodation to mean not neutrality but nonrecognition or even discouragement of religion. This would clearly be the "hostility" which the Constitution

[56] 3 J. STORY, COMMENTARIES, *supra* note 55, § 1868, at 726 (emphasis added).

[57] *Church of the Holy Trinity v. United States*, 143 U.S. 226, 232 (1892).

[58] *United States v. MacIntosh*, 283 U.S. 605, 625 (1931).

[59] *Zorach v. Clauson*, 343 U.S. at 313.

[60] *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

[61] *United States v. Seeger*, 380 U.S. 163, 166 (1965).

[62] *See* R. NEUHAUS, THE NAKED PUBLIC SQUARE 80-82 (1984) for a perceptive discussion of the theological implication of this drift. *Jeremiah* 17:5.

"forbids." [63] Prohibiting a moment of silence would demonstrate hostility in that it would deny "students the free exercise of religion by allowing them to pray only while pretending to be doing some other, officially sanctioned, classroom behavior." [64] To eradicate all religious exercises from public schools would not be neutrality, but hostility toward religion—in reality a "tax supported secularism" [65] which "prefers nonbelief over belief." [66]

Appellants Smith ask this Court to recognize accommodation as required because religious rights are inalienable, that is, God-given. The government, therefore, has an affirmative responsibility to adjust its programs and regulations in recognition of the preexisting religious rights of its citizens. The accommodation of the need for prayer [67] is very similar to the accommodation of the need for religious instruction in *Zorach*. Silence is certainly a neutral accommodation of needs protected by God-given, constitutionally protected rights.[68]

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[63] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[64] Brief for Amicus Legal Foundation of America at 10. Note the conflicts that state prohibition of all public religious practice set up for individuals as Appellants Smith who believe that they are required to pray to God at all times. *See* testimony of Pixie Alexander (T. 84) and Karen Phillips (T. 664). (T.) refers to pages of the original transcript.

[65] Brief for Amicus Moral Majority at 14.

[66] Brief for Amicus The Freedom Council at 22.

[67] On the needs of prayer generally, *see* Brief for Amici Christian Legal Society and National Association of Evangelicals at 4-7.

[68] *See* Brief for Amicus United States at 14-15. Appellants Smith would draw the attention of the Court to the annual Earth Day Ceremony at the United Nations. If the U.N., with its diverse religious beliefs, can sponsor the ceremony and people around the world can unite in silent prayer or meditation at the moment of the equinox, then the statute in the case at hand can certainly be viewed as a neutral accommodation to the needs of all and as nondivisive. *See* letter by Earth Society Foundation President John McConnell, SIERRA, May/June 1981, at 8.

CONCLUSION

Appellants Smith agree with Senator Weicker that "as evidenced by the works of Jefferson and Madison, our founding fathers firmly established that government has no jurisdiction in religious matters." [69] Jefferson was clear and consistent in his statements that the Federal Government, including the federal judiciary, had no jurisdiction over state religious matters.[70] Congressional debates and the subsequent failure to pass the Blaine Amendment are weighty evidence that the fourteenth amendment did not change the scope and reach of the first amendment.[71]

This case is a jurisdictional case. The trial court made some preliminary findings of fact at the initial hearings on a preliminary injunction.[72] These findings were later vacated when the trial court, after four days of testimony, issued an order dismissing for lack of federal jurisdiction.[73] The court of appeals, overreaching its authority, reached over the order vacating the preliminary injunction to resurrect the findings thereof and even made some findings of its own in order to reach issues left unresolved or unaddressed because of the dismissals.[74]

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[69] Brief for Amicus Weicker at 17. *See* discussions of beliefs of Jefferson and Madison as revealed by their public actions, *supra*, at note 14.

[70] *See* Jefferson's second inaugural address and the Kentucky Resolutions, *supra*, at 6 and note 21, and letter from Thomas Jefferson to Presbyterian clergyman (1808), reprinted in 9 P. FORD, LIFE OF JEFFERSON 174 (1904). *Accord Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845).

[71] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1118-26. *See also* Jurisdictional Statement for Appellants Smith at 11-21.

[72] *Jaffree v. James*, 544 F. Supp. 727 (1982).

[73] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1130 and *Jaffree v. James*, 554 F. Supp. at 1132.

[74] *Jaffree v. Wallace*, 705 F.2d at 1533, 1535. *Jaffree v. James*, 554 F. Supp. 1130, which vacated the preliminary injunction against

We find it similarly remarkable that a jurisdictional challenge has heretofore not been made to federal jurisdiction asserted over state religious matters left beyond the reach of federal intervention by the first amendment and unaffected by the fourteenth amendment. To our dismay, a thorough review of all the available briefs, including those of amici curiae, and oral arguments in major United States Supreme Court establishment clause cases reveals that no one challenged federal usurpation of exclusive state jurisdiction over state religious matters as prohibited by the first amendment and unchanged by the fourteenth amendment.[75]

When presented with such a challenge, the trial court initially acted in accordance with and gave obedient recitation to the established judicial gospel. Only after going beyond the dogma to the actual history itself was

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the statute and dismissed the complaint, did not contain any findings of fact. The companion case, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. 1104, contained no findings on this statute.

[75] We examined the oral arguments and all the briefs in the series by P. KURLAND & G. CASPER, THE LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES for the following cases: *Cantwell v. Conn.*, 310 U.S. 296 (1939); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Wis. v. Yoder*, 406 U.S. 205 (1972).

We examined the oral arguments and all the briefs in library microfiche files for the following cases: *Murdock v. Pa.*, 319 U.S. 105 (1943); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *McGowan v. Md.*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The only case where we can find a fourteenth amendment challenge even raised was *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), in Brief for Appellee State of New Jersey, printed in 47 P. KURLAND & G. CASPER, *supra*, at 1000-01. The appeal was dismissed for lack of standing with the Court never having taken jurisdiction. 342 U.S. at 432.

Judge Hand able to conclude "that the United States Supreme Court has erred in its reading of history." [76]

It was on December 4, 1961 that the Court gave the appearance of rejecting the Lord's sovereignty by asserting jurisdiction over prayers to the Almighty.[77] Now 23 years later on December 4, 1984, this Court will entertain oral arguments on another form of communication with God. The issue has not died or withered away. We agree with Senator Weicker that Jefferson was "sensitive to the potential divisiveness of government entanglement with religion. . . ," [78] recognizing that Jefferson spoke of the federal judiciary [79] as well. On the effects of this judicial intrusion into the sanctuary of prayer, Judge Hand observed:

> . . . The framers of our Constitution, fresh with recent history's teachings, knew full well the propriety of their decision to leave to the peoples of the several states the determination of matters religious. The wisdom of this decision becomes increasingly apparent as the courts wind their way through the maze they have created for themselves by amending the Constitution by judicial fiat to make the first amendment applicable to the states. Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of

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[76] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128.

[77] *Engel v. Vitale, cert. granted*, 368 U.S. 924 (1961).

[78] Brief for Senator Weicker at 16.

[79] *See supra*, at note 21.

the Republic. It is no wonder that the people perceive that justice is myoptic, obtuse, and janus-like.[80]

In a new book on the adverse effects on democracy of "human passions unbridled by morality and religion," Richard John Neuhaus writes:

> The prelude to . . . totalitarian monism is the notion that society can be ordered according to secular technological reason without reference to religious grounded meaning. [John Courtney] Murray again: "And if this country is to be overthrown from within or from without, I would suggest that it will not be overthrown by Communism. It will be overthrown because it will have made an impossible experiment. It will have undertaken to establish a technological order of most marvelous intricacy, which will have been constructed and will operate without relations to true political ends: and this technological order will hang, as it were, suspended over a moral confusion; and this moral confusion will itself be suspended over a spiritual vacuum. This would be the real danger resulting from a type of fallacious, fictitious, fragile unity that could be created among us."

This "vacuum" with respect to political and spiritual truth is the naked public square. If we are "overthrown," the root cause of the defeat would lie in the "impossible" effort to sustain that vacuum. Murray is right: not Communism, but the

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[80] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1129. Appellees, too, are inconsistent and confused. They think it alright for the state to permit "concentration of thought" on the Divine, but not silent prayer to the Divine. Brief for Appellees Jaffree at 10 & n.14, 11. The ridiculousness of such a strained, attempted distinction is demonstrable from the very source they cite, ENCYCLOPAEDIA JUDAICA (1971), which identifies prayer as a form of meditation, 11 *id.* at 1218, and meditation as a form of prayer, 13 *id.* at 978.

> effort to establish and maintain the naked public square would be the source of the collapse.[81]

Such would be the result of the establishment of a "religion of secularism" condemned in *Schempp*, 374 U.S. at 225. The action that Appellees Jaffree request of this Court would be another stride down that road.

John Adams foresaw the danger in such a course of action when he said: "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our constitution was made only for a moral and a religious people. It is wholly inadequate for the government of any other."[82]

Murray Friedman recently commented on the results of the present course of action urged upon this Court:

> But one may question whether "*silent meditation*" . . . [is] the critical problem[]. . . . May not the breakdown of the orderly norms of our society constitute, in fact, a far more serious threat to the Jewish community? To be sure, displaying the Ten Commandments on a schoolhouse wall would not in itself strike a major blow against the "new paganism," but an argument can be made that *removing the institutional religious supports and symbols of decency may contribute to the decline of morality itself.*[83]

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[81] R. NEUHAUS, *supra* note 62, at 85. *See also id.* at 100-03, 80-82, 84-87. After reading Neuhaus' insightful analysis, one might ponder if Judeo-Christian religious references are becoming the new blasphemy under an established "religion of secularism".

[82] Quoted in R. NEUHAUS, *supra* note 62, at 95.

[83] Keynote speech by Murray Friedman at the annual meeting of the Association of Jewish Community Relations Workers (June 1980), *printed as* Friedman, *A New Direction for American Jews*, COMMENTARY, Dec. 1981, at 43 (emphasis in original and added).

> In striving for the separation of church and state, . . . agencies earnestly believed they were preventing harassment and providing safeguards for Jews, religious dissenters, and non-

In view of the contemporaneous acts of the First Congress and the need to keep the public square open to free religious expression, Appellants Smith desire a reinstatement of the original meaning of the First Amendment, as evidenced by its language, framers' intent and history.[84] However, in the alternative, Appellants suggest that silent "meditation or voluntary prayer" is constitutional, even under the establishment clause precedents of this Court.

Respectfully submitted,

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believers. Their activities, however, reflected a secular bias that was at best indifferent, when it was not actively hostile, to religion itself. They chose not to see that the "church" they sought to disestablish was not just a sect but embraced a collection of beliefs and values deeply embedded in the society, values which while causing uneasiness in religious outsiders, provided an order and coherence that had made it possible for Jews (and others) not only to live comfortably but indeed to prosper.

Id. at 39.

[84] There has been, "as Mr. Justice Holmes said, 'an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (per Brandeis, J.).